IN THE HIGH COURT OF HIMACHAL PRADESH,
SHIMLA.

Regular Second Appeals No. 633 of 2000, 643 of 2000 & Cross -objections No. 308 of 2001.

Judgment reserved on: October 19, 2006.

Date of Decision: **November 2, 2006**.

(i) **RSA No. 633 of 2000**

Anil Mohil and another .....Appellants.

Versus

Bikram Singh Thakur & others …Respondents.

(ii) **RSA No. 643 of 2000**

Anil Mohil and another .....Appellants.

Versus

Bikram Singh Thakur & others ….Respondents.

(iii) **Cross-objections No. 308 of 2001**

Bikram Singh Thakur ….Cross-Objector.

Versus

Anil Mohil and others …Respondents.

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The Hon'ble Mr. Justice V.K. Gupta, Chief Justice.

Whether approved for reporting?[1] *No*

For the Appellant(s): Mr.Kuldip Singh, Sr. Advocate with Mr. Bimal Gupta, Advocate, for the appellants in both the appeal and respondents No. 1 and 2 in Cross-objections No. 308 of 2001.

For the Respondents: Ms. Jyotsana Rewal Dua, Advocate, for respondent No.1 in both the appeals and for Cross-Objector in Cross-objections No. 308 of 2001.

Mr. Ajay Dhiman, Advocate, for respondents No. 2 to 9 in both the appeals and respondents No. 3 to 10 in Cross-objections No. 308 of 2001.

V.K. Gupta, C. J. :

By this common judgment, both the above mentioned Regular Second Appeals and the Cross-objections filed in Regular Second Appeal No. 643 of 2000 are being disposed of together.

[1] Whether Reporters of Local Papers may be allowed to see the judgment?

Both the aforesaid Second Appeals were admitted vide Court's Order dated 24th April, 2001 on the following two substantial questions of law:-

> "1. What is the effect of non appearing of the plaintiff-respondent in the witness box in support of his case.
> 2. What is the effect of appearance as a witness of the General Power of Attorney for and on behalf of the plaintiff- respondent."

Cross-objections No. 308 of 2001 were admitted vide Court order dated 2nd July, 2001 but without formulating any substantial question of law. Vide a detailed judgment dated 4th April, 2003 a learned Single Judge of this Court considered the following question:-

> "Whether the substantial question(s) of law as are required to be framed in second appeal, are also required to be framed in cross-objections, and, if not, what is the scope of hearing on such cross-objections?"

Answering the aforesaid question, the learned Single Judge held as under:-

> "(a) cross objection under Order 41 Rule 22, Code of Civil Procedure in an appeal against an appellate decree can be maintained only if a substantial question of law is raised therein;
> (b) Since a cross objection is nothing but in the nature of a cross appeal, the stringent conditions embodied in Section 100, Code of Civil Procedure, shall be applicable thereto. The cross objection will precisely state the substantial question(s) of law arising therein;
> (c) The cross objection will be admitted only if the High Court is satisfied that the case involves substantial question(s) of law; and

(d) On such admission, the High Court has to formulate the substantial question(s) of law arising therein and the cross objection shall be heard only on the question(s) so formulated."

Thereafter however, no substantial question of law was formulated in the aforesaid Cross-objections.

The facts giving rise to the filing of the present Appeals and the Cross-objections are that a property situated in Mohal Naya Bazar, Nahan was owned by one Rasal Singh at the relevant time. He had three sons, namely, Bikram Singh, Jairaj Singh and Anand Singh. Anand Singh was not traceable since 1951 and thus was presumed to have died. His share with respect to the property in question was inherited by the other two sons of Rasal Singh, namely, Bikram Singh and Jairaj Singh in equal shares.

The partition of the property jointly owned by Bikram Singh and Jairaj Singh took place on 16th June, 1960 but the same was not reflected in the Revenue record. Suit No. 39/1 of 1986 was filed by Bikram Singh for partition of the property in question. Based on a compromise effected on 28th March, 1988 the suit property was ordered partitioned vide a decree passed in the aforesaid suit on 1st April, 1988. The parties' contention since then has been that the parties continued to occupy their respective shares consequent upon the aforesaid partition.

The bone of contention and the subject matter of controversy here is a portion of land from out of the aforesaid partitioned property, shown as ABCD (D) EFGHIJ in the site plan Ex.P-2 in the aforesaid suit of 1988 comprising in khasra Nos. 202, 221/1, 222/2, 222 and 225/1 measuring 105.79 square metres which was agreed upon and left as joint for the common use of the two brothers, namely, Bikram Singh and Jairaj

Singh as well as the members of their families etc. Bikram Singh even though earlier used to live in India, left India and settled in USA. He had got settled in USA since 1978. He used to visit India, especially Nahan only on specific occasions. When in September/ October, 1991 his wife Salochana Thakur visited Nahan and came at the suit property, she was surprised to find that Jairaj Singh had constructed a huge gate on the entrance from Naya Bazar side and had also constructed a staircase, bath room-cum- toilet and a water tank in Deori (common passage) upon the said property without the consent of Bikram Singh and without his knowledge. Debris was also thrown around in the vacant site fallen to the share of Bikram Singh. Later on when Salochana Thakur again visited Nahan in February, 1993 she found that a room measuring 12 ft. x 13 ft. had been constructed in the common passage leading to the property of Bikram Singh which had blocked this passage and prevented him access to his property. It is the contention of Bikram Singh that he had requested the defendants to demolish the aforesaid construction in the common passage but because of their failure to do so Civil Suit No. 80/1 of 1993 was filed by Bikram Singh in the Court of learned Sub Judge, Ist Class, Nahan, District Sirmaur.

The contention of the defendants in the suit was that the ancestral property was inherited by defendant No.1 and the plaintiff in equal shares because of the fact that Anand Singh had not been heard of since 1951. The factum of partition consequent upon the family settlement in 1960 had been admitted. The filing of suit in 1988 and passing of a compromise decree was also admitted. It was also admitted that 105.79 square metres of land was left for the common use of the parties. With a view to rebuild the old storage tank, some construction was raised. This construction was completed in the year 1961. Earlier there was a wooden

gate installed but this was replaced by an iron gate some-time in the year 1985-86. Defendants No. 2 and 3 in the suit being the son and daughter-in-law of defendant No.1 had filed a separate written statement in which it was pleaded that some-time in 1974-75 they had taken over the possession of the property which had fallen to the share of the plaintiff in June, 1960 and built thereupon pucca structure in the area which adjoins the old latrine recorded in khasra No.222. Defendant No.2 adversely took possession of the entire property falling to the share of the plaintiff and ever since then has been asserting his hostile title to the same and by lapse of time (more than 17-18 years) he had become the owner of the same by adverse possession. The following issues were framed in the suit for the trial:-

1. Whether the compromise dated 22-04-1987 took place between the plaintiff and defendant No.1 as alleged? OPP
2. Whether the defendants have blocked the passage of the plaintiff leading to his property as alleged ? OPP
3. Whether the defendant No.1 in violation of the terms of compromise dated 22-04-1987 has put to his exclusive use and occupation some part of joint property as alleged? OPP
4. Whether the defendants have thrown debris on the suit land as alleged, if so whether the plaintiff is entitled for mandatory injunction as prayed? OPP
5. Whether the suit is not maintainable as alleged? OPD 2 and 3.
6. Whether the defendants No. 2 and 3 have been coming in adverse possession of the suit land and as such have become exclusive owners thereof? OPD
7. Whether the suit is not maintainable in the present form? OPD

8. Whether the plaintiff is estopped from filing the suit as alleged? OPD
9. Whether the defendants No. 2 and 3 created a permanent irrestible (sic) in their favour by raising permanent structure on the suit land as alleged? OPD
10. Whether the defendant No.1 raised construction as alleged in 1960-61 and turns the plaintiff is not entitled for the relief of mandatory injunction? OPD
11. Relief.

The learned trial Court of Sub Judge Ist Class, Nahan vide his judgment and decree dated 21st September, 1999 decreed the suit in its entirety by granting mandatory injunction as well as permanent prohibitory injunction in favour of the plaintiff to the effect that the defendants were directed to remove the aforesaid unauthorized construction raised by them in the shape of outer gate to the entrance, staircase, bath room-cum- toilet, the room preventing the approach to the property from the common passage adjoining to the latrine. The defendants were also restraining by passing the decree of permanent prohibitory injunction from interfering or trespassing into the aforesaid property.

The defendants filed Civil Appeals No. 119-CA/13 of 1999 and 120-CA/13 of 1999. The learned District Judge, Sirmaur District at Nahan vide his common judgment dated 12th September, 2000 disposed of the appeals. In so far as the installation of the iron gate by replacement of the wooden gate and the construction of the staircase, bath room-cum-toilet and water tank in the Deori were concerned, based on the fact of acquiescence with respect thereto by the plaintiff himself as well as through his wife and applying the principles emanating from Section 39 of the Specific Reliefs Act he set aside the judgment and decree of the

trial Court but in so far as the construction of the room measuring 12 ft. x 13 ft. by defendants No. 2 and 3 was concerned the learned District Judge upheld the decree passed by the learned trial Court. While therefore dismissing the suit of the plaintiff for demolishing the iron gate in front of the property from Naya Bazar as well as the staircase, bath room-cum- toilet and the water tank in the common Deori, the part of the decree passed by the trial Court with respect to the room measuring 12ft. x 13 ft. constructed by the defendants in the common passage of the parties and thus blocking the entrance of the plaintiff to the property fallen to his share was upheld. That part of the decree was also upheld which had directed the defendants to remove the debris/ malva thrown in the vacant site of the property. The learned District Judge has also upheld the part of the decree which had restrained the defendants from interfering in lawful and peaceful use of the property fallen to the share of the plaintiff as well as the property kept for common use of the parties.

The plaintiff has filed the Cross-objections against the aforesaid part of the judgment of the learned District Judge which has partly dismissed the suit of the plaintiff.

I have heard the learned counsel for the parties and also perused the original record of the Courts below.

In my considered opinion, the findings by the learned District Judge that the plaintiff had acquiesced with respect to the installation of the iron gate (originally wooden gate) and the construction of the staircase, bath room-cum- toilet and the water tank in the common Deori is based on proper appreciation of evidence because indeed on a reading of the statement of Salochana Thakur, the wife of the plaintiff as well as General Power of Attorney holder of the plaintiff it is clearly made out that the plaintiff and his wife had not objected to the aforesaid

constructions. They can be said to have actually acquiesced to the aforesaid constructions because these constructions were raised long before the filing of the suit. If the plaintiff either himself or through his wife who is also his General Power Attorney holder had acquiesced with respect to the installation of the iron gate as well as the construction of the staircase, bath room-cum- toilet and the water tank, they cannot be allowed now to turn around and urge that the aforesaid be removed or demolished, especially when admittedly these were raised/ constructed long long before the filing of the suit. No fault can therefore be found with the aforesaid aspect in the judgment of the learned District Judge. Similarly, in so far as the remaining part of the decree passed by the learned trial Court is concerned which ordered the demolition of the room measuring 12 ft. x 13 ft. and issuing other directions qua non-interference with respect to the part of the property and the blockade of the entrance of the plaintiff is concerned, indeed both the Courts below have taken a correct view that this room was constructed not in the year 1974-75 but some-time immediately prior to the filing of the suit and this construction being wholly illegal and in violation of the right of the plaintiff qua the common passage was indeed required to be demolished. Indeed the defendants had no right to encroach upon the land which belonged to the plaintiff and was in plaintiff's possession. The defendants had no right thus to raise any construction thereupon. This act of the defendants was wholly illegal. Both the Courts below have rightly rejected the plea sought to be set up by the defendants based upon their claim of adverse possession. On a proper appreciation of evidence, I can say without any doubt in my mind that the plea of adverse possession was not at all sustainable in the facts and circumstances of this case.

I, therefore, find no merit in the aforesaid two appeals and dismiss the same. In so far as the Cross-objections are concerned, I also hold that neither there is any merit in the Cross-objections nor any substantial question of law is involved for consideration therein. These are also dismissed.

The parties are left to bear their own costs.

November 2, 2006. **(V.K. Gupta), C.J.**
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